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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL HANSON,

Defendant and Appellant.

F057548

(Super. Ct. No. VCF209929A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Donn Ginoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter and Leanne LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found appellant Abel Hanson and two codefendants (Jose “Joe” Hanson and Jose Ruiz) guilty of two counts of assault by means of force likely to produce great

bodily injury (Pen. Code, § 245, subd. (a)(1); counts 1 and 2) and one count of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 3).¹ Special allegations that the crimes in counts 1 and 2 were committed for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)) were also found to be true. The victim in count 1 was Manuel Mendoza. The victim in count 2 was Marisa Guillen. The jury also found true a special allegation that appellant and his codefendants caused great bodily injury to Mendoza.

In a bifurcated proceeding the court found true a special allegation that appellant had served a prior prison term (§ 667.5, subd. (b).) The court sentenced appellant on count 1 to three years for the assault, plus 10 years for the gang enhancement, plus three years for the great bodily injury enhancement. A one-year section 667.5, subdivision (b) enhancement was stayed. Concurrent sentences were imposed on counts 2 and 3, resulting in a total prison term of 16 years.

APPELLANT'S CONTENTIONS

Appellant makes three contentions of error on this appeal. First, he asserts that his count 2 conviction for assault by means likely to produce great bodily injury is not supported by substantial evidence. Second, he contends the jury's findings that he committed the assaults for the benefit of, in association with, or at the direction of a criminal street gang are not supported by substantial evidence. Third, he contends that his count 3 conviction for active participation in a criminal street gang is not supported by substantial evidence. As we shall explain, we find these contentions to be without merit.

FACTS

Sisters Angela Mendoza, Janie Diaz and Amanda Cabanyog each had a child baptized on the morning of September 13, 2008. One child was Marcus, the son of

¹ All further statutory references are to the Penal Code unless otherwise stated.

Angela Mendoza and Manuel Mendoza. Another was Michael or “Motito,” the son of Janie Diaz and Mike Diaz. The third was Anthony, the son of Jose “Joe” Hanson and Amanda Cabanyog. In the afternoon the families had a party at a park in Porterville. The party at the park started at about 3:00 p.m. and went on all day and into the evening. There was food, a DJ playing music, and, as one witness described it, “everybody was drinking.” At the end of the party at the park, people were invited to continue partying at the home of the three sisters’ parents, the Cabanyogs. People began arriving at the home sometime after 10:00 p.m.

Jose “Joe” Hanson came to the Cabanyog home and brought his brother Abel Hanson and some friends. Joe was a member of the Varrio Central Poros or VCP street gang, a Norteno gang. “Poros” is a slang term for Porterville. Joe had the word “Central” tattooed on his back and a tattoo saying “fuck those who oppose” on one of his shoulders. Joe was also known as “Buck” or “Little Joe.” Joe’s brother Abel Hanson was a member of the same gang. Among his tattoos were the letters “VCP” on his fingers, the word “ene” (a Spanish designation for the letter N) on one arm, and the phrase “[c]an’t stop, won’t stop.” His moniker or nickname was “Bullet,” and he had the words “Gangster Bullet” tattooed on one arm, and a tattoo of a large bullet on one calf. Detective Marcial Morales, the prosecution’s gang expert, explained at trial that these tattoos were gang-related. He testified that the phrase “fuck those who oppose,” for example, is “a common term used in the writings of the northern structure, the Norteno cause.” Other VCP gang members who came to the Cabanyog home that night included Michael Gutierrez (“Duck”), Juvencio Godinez (“Hoover”) and Jose Ruiz (“Boni”).

The assaults took place in front of the Cabanyog home, located on the 1400 block of West Forest Avenue in Porterville. Marisa Guillen was either the wife or girlfriend of the Cabanyogs’ son Jesus Cabanyog. Marisa lived either in that house or in a house nearby, but referred to the Cabanyog home as “our house.” At the time of trial in this matter, almost every non-law enforcement witness who testified claimed not to remember

much or not to have seen much about the incident. These included Marisa Guillen. The day after the incident, however, investigating Officer Wayne Martin interviewed Marisa at the Porterville Police Department in a room equipped with an audio recording system. The interview was recorded without Marisa's knowledge, and this recording was played for the jury at the trial. In it she described the incident as follows.

When Joe's friends showed up (apparently at the park party earlier in the day) "[o]ur family was like, you know, we were kind of like okay, we don't want to start problems so we let them stay." When Joe's friends later came to the house, someone asked Jose Ruiz ("Boni") to leave. It is not clear who made this request or why, but Marisa knew Boni because Boni used to date her husband or boyfriend Jesus Cabanyog's little sister. (Other testimony made clear that this younger sister was Myra, not one of the three sisters who had children baptized that day.) Abel Hanson, who Marisa described as "the instigator," then said to Jose Ruiz (Boni): "'You're going to let him talk to you like that. You better sock him.'" Boni then either hit or tried to hit the person who had asked him to leave. Abel Hanson and another one of Joe's "friends" then "jumped in" and one man was getting beaten up by three. Marisa herself then "had to jump in because, you know, I'm not going to let, you know, somebody get beat up." Marisa herself was then struck. It was Abel who was hitting her. When she was asked "Where did he hit you?" she stated that Abel hit her "everywhere" but not in the face and that he "scratched me here and then I have these bruises here." Marisa did not see any weapons. Abel Hanson was using his hands and was "punching me." After Marisa (Manuel Moendoza's sister-in-law) was struck, Manuel Mendoza "came and he started hitting them, and then all these other guys came out of nowhere." The site of this incident was of course the home of Manuel Mendoza's in-laws. Other testimony described what Mendoza was doing as "trying to break up a fight." Marisa said that "four ... guys were beating up on Manuel" while the rest of Joe's friends were fighting "two guys" (apparently the man who had initially asked Boni to leave, and another man who had come to assist him). One of the

four guys who beat up Manuel Mendoza was Abel Hanson, who Marisa saw “punching Manuel in the head.” She also saw Boni punching Manuel. Manuel fell, and he “was on the ground so then they just started kicking him and stuff.”

Marisa asked the attackers why they were doing this, and one of them responded “That’s my homeboy, we have to.” In the recorded interview Marisa further says: “He’s all, ‘We have to.’ I go, ‘Why?’ I go, ‘You guys just need to leave.’ And he’s like, ‘I don’t care. I have to.’” Marisa told Abel Hanson “You need to leave” and Abel responded “F-you.” Abel “came after me again.” Abel’s girlfriend Valerie Barajas “tried to pull him away and said “Let’s go.” Abel Hanson responded “Nah” and then “[I]like a psycho, he just came at me again, and that’s when everyone started fighting again because he was coming after me, so the guys were trying to get him off again” A questioning officer in the recorded interview saw what he described as looking like “burn marks” on an unspecified portion of Marisa’s body. Marisa said “I think it’s from the road probably” and said that at some point during Abel’s attack on her Abel was dragging her by her hair.

When an officer arrived at the house, “they all just started running.” Marisa estimated that “there was about eight -- I guess eight of them and a girl” (Barajas). The guys “were all wearing white shirts.” She said the “eight of them” had been fighting “three guys” but did not name any of the three except Manuel Mendoza. The eight guys and the girl all got into a gray truck and left. In the recorded interview Marisa also said that she was afraid and “didn’t want them to come back because, you know, we have two kids and” She said she “was afraid they were just going to try to come back with guns or -- you know, just something because they were -- they didn’t have anything.” She said “I can’t testify against these guys.” She was asked why, and she answered “Because they will know I did it.” She was asked “Are you afraid of that?” and she answered “Yeah.”

The recorded interview of Marisa Guillen was not the first time Officer Wayne Martin had spoken to her. It was the third time. He first spoke to her when he arrived at

the Cabanyog home just after the incident had taken place. She told him then that Abel Hanson had been involved in the incident. Then he spoke to her again at the Porterville Police Department only about an hour after the incident. At the Police Department Marisa first told Martin that she didn't really care to be involved, but "then she stated that it was Joe and his brother Abel." At trial, Martin was asked: "And did she tell you what they were doing in regards to Manuel?" Martin's answer was: "Well, to quote her, she said, 'They were beating the fucking shit out of him.'" She also told him that Abel had assaulted her too. When Martin asked her why she had not told him this during their first contact, Marisa "told me that she was afraid and didn't care to be involved."

Manuel Mendoza was taken to a hospital after the attack. He suffered injuries to his shoulder, arm, leg, face and chest. After the attack his whole chest, left arm and left leg turned "black." Two months later he underwent surgery to repair what he described as a "hole" in his left armpit or pectoral area. He was a plasterer and a foreman, but due to his injuries he was disabled and did not work at all between the time of the attack and the time of trial. At the time of trial Mendoza still could not lift his left arm higher than the level of his heart.

Detective Chris Contreras also investigated the incident. He spoke to Mendoza on September 18, 2008, and Mendoza identified four of his assailants as Abel Hanson, Joe Hanson, and two others who went by the nicknames "Hoover" and "Duck." Mendoza said there were at least five assailants. He described a fifth assailant but did not know the name or nickname of the fifth one.

At the scene on September 13 Officer Martin also spoke to a seventh-grade son of Janie Diaz. Martin testified that the boy told Martin two of the subjects involved were "Joe" and "Joe's brother." The boy "said that Joe's brother was the main person hitting Mr. Mendoza." On or about September 16 Detective Contreras spoke to Janie Diaz. Contreras testified that Diaz told him "her son wasn't gonna turn her [*sic*] back on her -- on his Uncle Joe because he is family."

None of the three defendants called any defense witnesses at the trial except for Jose Ruiz, who testified in his own defense. He denied that he was a gang member, but was impeached with an inmate classification questionnaire he had signed. On it he responded to the question “Do you associate with prison gangs?” with the answer “North,” and responded to the question “Do you have any known enemies?” with the answer “South.” He claimed that he had been struck first during the incident on September 13, and also said that he never saw Abel Hanson or Joe Hanson there.

I.

THE COUNT 2 CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard of Review

When a criminal conviction is challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ [Citations]” (*People v. Hillery* (1965) 62 Cal.2d 692, 702.) “[I]t is the *jury*, not the appellate court, which must be convinced of the defendant’s guilt beyond a reasonable doubt.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) “[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*Ibid.*)

B. Substantial Evidence Supports the Conviction

Section 245, subdivision (a)(1) states in pertinent part: “Any person who commits an assault upon the person of another ... by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years” “[W]hether the force used by the defendant was likely to produce great bodily injury is a question for the trier of fact to decide.” (*People v. Sargent* (1999) 19 Cal.4th 1206, 1221.) Because the statute focuses on “force likely to produce great bodily injury” (§ 245, subd. (a)(1)), the statute can be violated even if the victim suffers no harm at all. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; *People v. Wingo* (1975) 14 Cal.3d 169, 176.) “While it is true that ‘when the evidence shows that a blow has been struck or a physical injury actually inflicted, the nature and extent of the injury is a relevant and often controlling factor in determining whether the force used was of a felonious character’ [citations], an injury is not an element of the crime, and the extent of any injury is not determinative. ‘The crime ... like other assaults, may be committed without infliction of any physical injury, and even though no blow is actually struck. [Citation.] The issue, therefore, is not whether serious injury was caused, but whether the force used was such as would be likely to cause it.’ [Citations.]” (*People v. Covino* (1980) 100 Cal.App.3d 660, 667.) “The statute prohibits an assault by any means of force *likely* to produce great bodily injury, not the use of force which does *in fact* produce such injury. While ... the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.” (*People v. Muir* (1966) 244 Cal.App.2d 598, 604; *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1068.) “[T]he question of whether or not the force used was such as to have been likely to produce great bodily injury, is one of fact for the determination of the jury based on all the evidence, including but not limited to injury inflicted.” (*People v. Muir, supra*, 244 Cal.App.2d at p. 604; in accord, see also *People v. Armstrong, supra*, 8 Cal.App.4th at p. 1066, and *People v. Sargent, supra*, 19 Cal.4th at p. 1221.) “Great bodily injury is bodily injury which is significant or

substantial, not insignificant, trivial or moderate.” (*People v. Covino, supra*, 100 Cal.App.3d at p. 668; *People v. Armstrong, supra*, 8 Cal.App.4th at p. 1066.)

In the recorded interview, Marisa Guillen was asked “Where did he [Abel] hit you?” She answered: “Right. Everywhere. I don’t know, in my arm -- he didn’t hit me in the face, actually, he just scratched me here and then I have these bruises here” She was asked “Those are from him?” She answered: “Yeah. I mean, they had to be. He was the only guy that was hitting me.” She said that Abel was “punching me.” “That the use of hands or fists alone may support a conviction of assault ‘by means of force likely to produce great bodily injury’ is well established” (*People v. Aguilar, supra*, 16 Cal.4th at p. 1028; see also *People v. Armstrong, supra*, 8 Cal.App.4th at p. 1066; *People v. Duke* (1985) 174 Cal.App.3d 296, 302-303; and *People v. Chavez* (1968) 268 Cal.App.2d 381.) Marisa again stated that she had “bruises” and “I’m really sore.” She said that when Abel’s girlfriend tried to pull him away and said “Let’s go,” Abel Hanson said “Nah” and “Like a psycho, he just came at me again, and that’s when everyone started fighting again because he was coming after me, so the guys were trying to get him off again” When a Detective noticed what he described as “burn marks on this side,” Marisa said “I think it’s from the road probably” and said that Abel at some point had been dragging her by her hair and “when I got up this morning all my hair -- like I brushed my hair and, like, a big wad of my hair got ... it was just all stuck together.”

The jury saw pictures of arm injuries suffered by Marisa and of what she described as a “scratch” on her cheek. The pictures were taken on September 14, the day after the incident. In his argument to the jury, the prosecutor called the jury’s attention to one of these photos and said “Count 2, if there was a picture worth a thousand words, this may be it. This is on September 14th during her interview.” Appellant has chosen not to include these photos as part of the record on this appeal. We must presume from this omission that the photos might aid in leading a reasonable juror to conclude that Marisa was assaulted by means of force likely to produce great bodily injury, even though it

appears to be conceded that Marisa did not in fact incur any great bodily injury. “‘It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from’” (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373.) We also note that none of the three defendants argued at trial that if Marisa Guillen was assaulted, the assault was not by means of force likely to produce great bodily injury. The unsuccessful defense was that whatever force was used was not an assault but was self-defense. Also, the jury may well have been of the view that Marisa would likely have suffered great bodily injury if not for the “guys ... trying to get him [Abel] off” of Marisa, Abel’s girlfriend, Valerie, trying to pull Abel off of Marisa, and the police arriving and causing the assailants to flee. (See *People v. Covino*, *supra*, 100 Cal.App.3d at pp. 667-668.) On this evidence, we cannot conclude that no reasonable trier of fact could find that the assault was by means of force likely to produce great bodily injury.

II.

THE JURY’S FINDINGS ON THE GANG ENHANCEMENT ALLEGATIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

“The substantial evidence standard of review applies to section 186.22 gang enhancements.” (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) (See part “I” above.) Section 186.22, subdivision (b)(1) provides for an enhanced penalty for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) The language “for the benefit of, at the direction of, or in association with any criminal street gang” is sometimes called the “first prong” section 186.22, subdivision (b)(1), and the language “‘with the specific intent to promote, further, or assist in any criminal conduct by gang members’” is sometimes called the “second prong.” (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.)

Appellant argues that the evidence was insufficient to support a finding that the section 245, subdivision (a)(1) assaults on Manuel Mendoza (count 1) and Marisa Guillen (count 2) were committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1)) because, in the words of appellant’s brief, “there was insufficient evidence that appellant’s specific intent was to benefit the VCP gang, as opposed to whatever personal objective he may have had.”

The argument fails. The statute does not require a specific intent to benefit the gang. It requires “the ‘specific intent to promote, further, or assist in any criminal conduct by gang members’” (§ 186.22, subd. (b)(1).) “[S]pecific intent to benefit the gang is not required.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) “As to the second prong of the enhancement, all that is required is a specific intent ‘to promote, further, or assist in any criminal conduct by gang members.’ (§ 186.22, subd. (b)(1).) Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]” (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 322.) “There is no requirement in section 186.22, subdivision (b), that the defendant’s intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense the defendant commits. To the contrary, the specific intent required by the statute is ‘to promote, further, or assist in *any* criminal conduct by gang members.’ (Pen. Code, § 186.22, subd. (b), italics added.) ... [¶] ... [T]here is no requirement in section 186.22 that the crime be committed with the intent to enable or further any other crime” (*People v. Hill* (2006) 142 Cal.App.4th 770, 774.)

Nothing in the cases cited by appellant holds otherwise, except for the federal case of *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, which construed the words “in any criminal conduct by gang members” to mean “in any other criminal conduct by gang members.” *Garcia* has been rejected by California courts as ignoring the plain language of the statute. (*People v. Hill, supra*, 142 Cal.App.4th 770; *People v. Romero* (2006) 140

Cal.App.4th 15, 19; *People v. Vazquez* (2009) 178 Cal.App.4th 37, 353-354.) Abel Hanson, Jose “Joe” Hanson and Jose Ruiz were all convicted of the assault on Manuel Mendoza (count 1) and of the assault on Marisa Guillen (count 2). All were members of the same gang. Reasonable jurors could certainly conclude that each of these defendants had the specific intent to assist the others in the commission of these crimes. Nothing more was required.

III.

THE COUNT 3 CONVICTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Section 186.22, subdivision (a) states in relevant part:

“(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

Appellant contends there is no substantial evidence that his participation in the CVP gang was active, and no substantial evidence that he willfully promoted, furthered, or assisted in any felonious criminal conduct by members of the VCP gang. Applying the substantial evidence rule (see part “I” above), we find these claims to be without merit.

In *People v. Castaneda* (2000) 23 Cal.4th 743, the court held “we construe the statutory language ‘actively participates in any criminal street gang’ (§ 186.22(a)) as meaning involvement with a criminal street gang that is more than nominal or passive.” (*People v. Castaneda, supra*, 23 Cal.4th at p. 747.) The *Castaneda* court explained that “actively participates” does not require any showing that the defendant devotes all or a substantial part of his time and efforts to the criminal street gang. (*Ibid.*) There was nothing nominal or passive about appellant’s involvement in the assaults by VCP members on Manuel Mendoza and Marisa Guillen. In *Castaneda* the court stated:

“[T]hrough evidence of the crimes defendant here committed, his many contacts on previous occasions with the Goldenwest criminal street gang, and his admissions by bragging to police officers on those occasions of gang association or membership, the prosecution presented sufficient proof that the defendant ‘actively participate[d]’ in a criminal street gang within the meaning of section 186.22(a).” (*Id.* at p. 753.)

In the present case, the evidence was similar. Detective Morales testified his opinion that Abel Hanson was an active gang member was “based on prior contacts with him when he was younger, gang tattoos, self-admission, ID’d in photographs, that kinda thing.” The jury saw a photograph of Abel Hanson flashing a gang sign. The photo was seized from Abel Hanson’s home on the day after the assaults. The jury also heard evidence that appellant told Jose Ruiz “You better sock him,” thus suggesting that at the time of the commission of the assaults Abel Hanson held a position of higher status in the gang than did Jose Ruiz. This was “sufficient proof” of active participation. (*People v. Castenada, supra*, 23 Cal.4th at p. 753.)

The assault by appellant and his two codefendants on Manuel Mendoza satisfied the “willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” requirement of section 186.22, subdivision (a). (*People v. Ngoun* (2001) 88 Cal.App.4th 432.)

DISPOSITION

The judgment is affirmed.

Ardaiz, P.J.

WE CONCUR:

Levy, J.

Gomes, J.